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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The order of the district court (App. A, *infra*, pp. 9–14) is not yet reported. The report of the Interstate Commerce Commission (App. C, *infra*, pp. 22–45) is published at 333 I.C.C. 720.

JURISDICTION

The judgment of the three-judge court (App. A, *infra*) was entered on March 19, 1970. Notices of appeal (App. B, *infra*) were filed by the Interstate Commerce Commission and the United States on May 14, 1970, and May 18, 1970, respectively. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162.

398-035—70——1

QUESTION PRESENTED

Whether the district court improperly required the discontinuance of one train to await the completion of all proceedings relating to another train without even considering the merits of the Commission's decision, which had concluded that the first train could properly be discontinued even if the second were not.

STATUTE INVOLVED

Section 13a(1) of the Interstate Commerce Act, as added, 72 Stat. 571, 49 U.S.C. 13a(1), provides:

> A carrier or carriers subject to this part; if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws

or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change un-

less notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

STATEMENT

In September 1968 the Interstate Commerce Commission authorized the Louisville and Nashville Railroad Company (L&N) to discontinue a train known as the "Hummingbird" which operated between Cincinnati and New Orleans. *Louisville and Nashville Railroad Company—Discontinuance of Trains, etc.*, 333 I.C.C. 720 (App. C, *infra*). A suit seeking review of this decision was first dismissed by the lower court on the ground that the Commission decision was not reviewable, a judgment subsequently reversed by this Court. *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106, reversed *sub nom., City of Chicago* v. *United States*, 396 U.S. 162. The trains have not operated since January 1969.[1]

After this Court's reversal, plaintiffs below filed a motion seeking remand to the Commission on the ground that the "Hummingbird" was closely related to another train discontinuance (the "Georgian") where defective notice had allegedly been given. See the

[1] An earlier restraining order lapsed in January 1969, when the lower court dismissed the action. Subsequent efforts to revive that order, before the lower court and this Court (Mr. Justice Marshall) were unsuccessful.

jurisdictional statement we are filing contemporaneously herewith in *United States, et al.* v. *City of Chicago, et al.*, to review the "Georgian" case. On February 5, 1970, the lower court summarily remanded both the "Hummingbird" and "Georgian" cases to the Commission. On March 19, 1970, after the Government and L&N had filed motions for rehearing but before any briefing or argumentation on the merits of the appeal,[2] the court consolidated the two cases, vacated its prior order, and entered a new judgment remanding the instant case to the Commission for further proceedings in conjunction with the "Georgian" case, which it was remanding on the defective notice ground.[3]

The basis of the instant remand, while not free from doubt, appears to have been the district court's belief that the Commission in its "Hummingbird" proceedings had not adequately considered the impact of a possible court victory by appellees in their appeal from the "Georgian" discontinuance. Appellees in their

[2] A hearing on various motions in the Georgian and Hummingbird cases was held before the lower court on November 4, 1968 (see transcript in Nos. 101 and 102, O.T., 1969). This hearing dealt almost entirely with a railroad motion to dismiss (culminating in *City of Chicago* v. *United States*, 396 U.S. 162), and plaintiffs' motion for summary judgment based on lack of notice as to the Georgian. The merits of neither proceeding were before the court. This was recognized by counsel for plaintiffs in arguing his Georgian notice motion: "All that is before you today is the jurisdictional issue. We are not here on the merits of this case today." (Tr. 26).

[3] The lower court also entered orders requiring restoration of the "Hummingbird" by April 3, 1970, pending further Commission proceedings. The restoration was subsequently stayed by this Court on April 3, 1970, pending appeal by L&N.